

## § 295.102

## 5 CFR Ch. I (1–1–16 Edition)

may rely upon in any legal proceeding against the United States.

### § 295.102 Applicability.

This part applies to demands and requests to employees of OPM in legal proceedings in which OPM is not a named party, for factual or expert testimony relating to official information or for production of official records or information. However, it does not apply to:

(a) Demands upon or requests for a current OPM employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of OPM;

(b) Demands upon or requests for a former OPM employee to testify as to matters in which the former employee was not directly or materially involved while at OPM;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552(a); and

(d) Congressional or Government Accountability Office (GAO) demands and requests for testimony or records.

### § 295.103 Definitions.

*Demand* means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of an OPM employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of OPM or a person to whom the General Counsel has delegated authority under this part.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*OPM* means the U.S. Office of Personnel Management.

*OPM employee or employee* means:

(1) Any current or former officer or employee of OPM;

(2) Any other individual hired through contractual agreement by or on behalf of the OPM or who has per-

formed or is performing services under such an agreement for OPM; and

(3) Any individual who served or is serving in any consulting or advisory capacity to OPM, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by OPM and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with OPM.

*Records or official records and information* mean:

(1) All documents and materials which are OPM agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in OPM files; and

(3) All other information or materials acquired by an OPM employee in the performance of his or her official duties or because of his or her official status.

*Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

## Subpart B—Requests for Testimony and Production of Documents

### § 295.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

### § 295.202 Factors OPM will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce

official records and information, in response to an appropriate demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (c) OPM has an interest in the decision that may be rendered in the legal proceeding;
- (d) Allowing such testimony or production of records would assist or hinder OPM in performing its statutory duties or use OPM resources in a way that will interfere with the ability of OPM employees to do their regular work;
- (e) Allowing such testimony or production of records would be in the best interest of OPM or the United States;
- (f) The records or testimony can be obtained from other sources;
- (g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;
- (h) Disclosure would violate a statute, Executive order or regulation;
- (i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or would otherwise be inappropriate for release;
- (j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;
- (k) Disclosure would result in OPM appearing to favor one private litigant over another private litigant;
- (l) Disclosure relates to documents that were produced by another agency;
- (m) A substantial Government interest is implicated;
- (n) The demand or request is within the authority of the party making it;
- (o) The demand improperly seeks to compel an OPM employee to serve as an expert witness for a private interest;
- (p) The demand improperly seeks to compel an OPM employee to testify as to a matter of law;

(q) The demand or request is sufficiently specific to be answered.

**§ 295.203 Filing requirements for demands or requests for documents or testimony.**

You must comply with the following requirements whenever you issue demands or requests to an OPM employee for official records and information or testimony.

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on OPM or an OPM employee before submitting a written request and receiving a final determination, OPM will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved.

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on OPM to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OPM employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;